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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

NATHANIEL OGUNLEYE,

Defendant and Respondent.

F050288

(Super. Ct. No. VCF069473)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Ronn M. Couillard, Judge.

Phillip J. Cline, District Attorney, Don H. Gallian and Carol B. Turner, Assistant District Attorneys, and Barbara J. Greaver and Todd Hayward, Deputy District Attorneys, for Plaintiff and Appellant.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Respondent.

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Respondent Nathaniel Ogunleye was sentenced to a total prison term of ten years and four months pursuant to a plea agreement, which included his no contest plea to felony assault with a deadly weapon. In pronouncing sentence, the trial court *stayed* the three-year enhancement under Penal Code¹ section 12022.7 for inflicting great bodily injury. Because the court did not strike the enhancement, the Department of Corrections treated respondent as a violent offender and limited his sentence credits to fifteen percent pursuant to section 2933.1. Respondent then sought relief by petition for writ of habeas corpus, asserting that he was being denied the full benefit of his plea bargain. When word of the petition reached the sentencing judge, he issued an amended sentencing order *striking* the enhancement. Shortly thereafter, the judge assigned to the petition for writ of habeas corpus summarily granted relief on the merits without first issuing an order to show cause or a writ. In separate appeals, the People (hereafter appellant) challenge the validity of both orders on procedural grounds, contending that (1) the amended sentencing order was improper because no statement of reasons for striking the enhancement was set forth as required by section 1385, and (2) the order granting relief under the petition for writ of habeas corpus was improper due to failure to comply with procedural requirements and due process. We agree and, by separate opinions, will reverse both orders with instructions on remand.

FACTS AND PROCEDURAL BACKGROUND

In 1999, in Tulare County Superior Court case No. 42479, respondent Nathaniel Ogunleye pled guilty to one count of possession of cocaine base for sale (Health & Saf. Code, § 11351.5), with an enhancement pursuant to section 12022, subdivision (c), and one count of sale or transportation of cocaine (Health & Saf. Code, § 11352). The court

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

imposed and suspended a nine year four month prison term, and placed respondent on probation.

Respondent was found to be in violation of his probation in March of 2001, based on his failure to obey all laws, i.e., commission of assault with a deadly weapon. Sentencing for respondent's violation of probation in case No. 42479 was postponed to coincide with sentencing in the assault case.

In the information filed in Tulare County Superior Court case No. 69473, respondent was charged with one felony count of assault with a deadly weapon by force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). In addition, the information included a special allegation that respondent inflicted great bodily injury upon the victim within the meaning of section 12022.7, subdivision (a), requiring a prison term enhancement of three years.

On April 27, 2001, a plea agreement was reached encompassing both the violation of probation (case No. 42479) and the assault with a deadly weapon count (case No. 69473). Under the plea agreement, the court was to impose a total sentence of ten years and four months. Accordingly, respondent pled no contest to the violation of section 245, subdivision (a)(1), and to the great bodily injury enhancement under section 12022.7. Judge Couillard then sentenced respondent as follows: A term of nine years and four months for the violation of probation (i.e., the previously suspended sentence), plus an additional, consecutive one-year term for the assault with a deadly weapon. As to the three-year enhancement under section 12022.7, Judge Couillard ordered that it would be "stayed" rather than stricken.

Subsequently, the Department of Corrections informed respondent that his total sentence would be calculated based on the 15 percent limitation on sentencing credits applicable to violent offenders as set forth in section 2933.1.

On March 1, 2006, respondent filed a petition for writ of habeas corpus in Tulare County Superior Court. The petition was assigned to Judge Ferguson. In the petition,

respondent argued that he was not a violent offender subject to the 15 percent limit on sentencing credits under section 2933.1, but was entitled to 50 percent credits` based on his plea bargain in which the consequences of the great bodily harm enhancement under section 12022.7 were *stayed*. That is, respondent claimed that since the section 12022.7 enhancement was stayed, the Department of Corrections had no legal basis to impose the section 2933.1 limits.

On March 1, 2006, Judge Couillard, who apparently had been apprised of respondent's petition, *sua sponte* ordered the great bodily injury enhancement stricken with respect to case No. 69473. The order stated as follows: "IT IS HEREBY ORDERED that the abstract of judgment and sentencing order dated April 27, 2001, be amended to reflect the enhancement, P[enal] C[ode section] 12022.7(a) is STRICKEN."

On March 6, 2006, Judge Ferguson issued his ruling granting respondent's petition for writ of habeas corpus. The ruling was as follows: "Petitioner claims he is not getting the benefit of his plea agreement by virtue of the fact he cannot get the credits to which he was entitled due to the fact the penal code section 12022.7(a) enhancement in case number 69473-01 was stayed rather than stricken. The petitioner is correct. The judge in said case has stricken the enhancement in an order dated March 1, 2006. The order will be sent to CDC. A copy is attached hereto as Exhibit 'A'. CDC is, therefore, ordered to give the petitioner those credits to which he is entitled by virtue of the striking of the enhancement. Petitioner's Petition for Writs of Habeas Corpus is granted to the extent that the petitioner is entitled to those credits afforded him by law."

According to appellant, both the March 1, 2006 order striking the enhancement and the March 6, 2006 ruling on the petition for writ of habeas corpus were made without affording appellant an opportunity to be heard.

On March 10, 2006, appellant filed a motion for reconsideration of the order striking the enhancement. Among other things, appellant asked the court to state its reasons for striking the enhancement. At the hearing, Judge Couillard expressed his

understanding that it was Judge Ferguson who made the initial finding that the enhancement should be stricken. After taking the matter under submission, the motion for reconsideration was denied.

Timely notices of appeal were filed in both the sentencing case and in the writ proceeding. The instant appeal, designated as case No. F050288, is taken from the amended sentencing order which struck the enhancement without explanation. The related appeal, designated as case No. F050303, is taken from the order granting the petition for writ of habeas corpus.² For convenience, we have discussed the issues together herein.

On September 26, 2006, several months after appellant filed its opening briefs, Judge Couillard issued a subsequent “Clarification of Order,” in which he stated that his March 1, 2006 order striking the great bodily injury enhancement “is hereby amended to reflect that the order was made in the interest of justice, Penal Code Section 1385 pursuant to defendant Ogunley[e]’s Petition for Writ of Habeas Corpus (see Judge Ferguson’s ruling thereon dated March 6, 2006).”³

DISCUSSION

I. Order Striking the Enhancement Failed to Comply with Section 1385

Appellant contends that Judge Couillard’s amended sentencing order was invalid because no statement of reasons for striking the enhancement was set forth as required by section 1385. Appellant is correct.

The original sentencing order in April of 2001 purported to “stay” the section 12022.7 enhancement. A trial court’s authority under section 1385 is to strike an enhancement, or to strike the additional punishment for that enhancement, in the furtherance of justice. (§ 1385, subds. (a) and (c); *People v. Meloney* (2003) 30 Cal.4th

² Because the cases are not consolidated, we have issued separate opinions. This opinion relates to case No. F050288.

³ Pursuant to California Rules of Court, rule 8.340, the amended order is included as part of the record on appeal.

1145, 1155.) However, a court is without authority to merely stay an enhancement, since it is mandatory unless stricken. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Jones* (1992) 8 Cal.App.4th 756, 758; *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1123.) A failure to either impose the enhancement or strike it (or strike the additional punishment) is a legally unauthorized sentence. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) An unauthorized sentence may be corrected at any time, whether by the trial court or the court of appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 854; *People v. Burnett* (2004) 116 Cal.App.4th 257, 260; *People v. Cunningham* (2001) 25 Cal.4th 926, 1044.) Here, it is conceded that the court's order staying the enhancement was unauthorized.

On March 1, 2006, the trial court attempted to correct its error by issuing an amended sentencing order which declared, "the enhancement ... is STRICKEN." The amended order was inadequate as a matter of law, and failed to cure the sentencing defect, because it did not set forth the court's reasons for exercising discretion under section 1385 as required. (§ 1385, subd. (a).) A valid exercise of the power to strike under section 1385 *must* be accompanied by a statement of reasons in the minutes. (*People v. Orin* (1975) 13 Cal.3d 937, 943-944; *People v. Jordan* (2003) 108 Cal.App.4th 349, 368; *People v. Bradley, supra*, 64 Cal.App.4th at p. 391.) If no reasons are specified in the minutes, there is no effective dismissal order under section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 532; *People v. Bradley, supra*, 64 Cal.App.4th at p. 392.) For this reason, we conclude that the trial court's attempt to strike the enhancement under section 1385 was invalid.

The trial court made one final attempt to rectify its sentencing order. On September 26, 2006, the court issued a "Clarification of Order" which amended its March 1, 2006, order to reflect that it was made "in the interest of justice" under section 1385 based on "[defendant's] Petition for Writ of Habeas Corpus (see Judge Ferguson's ruling thereon dated March 6, 2006)." We hold that this reference to the petition and ruling does not comply with the statutory requirement of an explicit statement of reasons.

Nothing in the petition for writ of habeas corpus, or the argument therein, discloses the trial court's reasons for striking the enhancement in the interests of justice. The petition merely asserted, based on the stayed enhancement and recent case law,⁴ that the Department of Corrections erroneously calculated the petitioner's sentencing credits. The relief sought therein was to have his credits accurately calculated or, alternatively, to allow him to withdraw his plea.

The "Clarification of Order" also mentions Judge Ferguson's ruling on the petition for writ of habeas corpus. The ruling arguably sheds some light on the matter, since it includes a statement by Judge Ferguson that the petitioner was not getting the benefit of his plea bargain because the enhancement was previously stayed rather than stricken. However, we note Judge Ferguson's ruling was not issued until March 6, 2006, five days *after* Judge Couillard's decision to strike the enhancement, and it even relies in part on the fact that the enhancement was already stricken. Moreover, to single out this one statement from the entire petition and ruling thereon, and conclude that it definitely expresses the reason or reasons for Judge Couillard's exercise of discretion, would amount to mere assumption on our part. Ultimately, it remains unclear why Judge Couillard decided on March 1, 2006, that it was in the interests of justice to strike the enhancement under section 1385. We will not engage in surmise or speculation as to the court's reasons for exercising discretion under section 1385, nor will that statute allow us to do so.⁵ The requirement that reasons be set forth in the minutes is mandatory, not merely directory. (*People v. Orin, supra*, 13 Cal.3d at p. 944.)

In this regard, it is helpful to recall the importance of the statutory mandate that the court explicitly state in the order its reasons for striking or dismissing in the interests

⁴ For example, the petition cited *In re Reeves* (2005) 35 Cal.4th 765, 780, and *In re Phelon* (2005) 132 Cal.App.4th 1214, 1217, interpreting section 2933.1.

⁵ Respondent invites us to conclude that the court was motivated by a desire to preserve the previously negotiated plea bargain. We decline to engage in making assumptions as to the court's reasons, or to assess the adequacy of such assumed reasons.

of justice. “The obvious purpose of this requirement is to curb arbitrary action for undisclosed reasons or motives.” (5 Witkin and Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 416, pp. 586-587.) “‘It is not enough that on review the reporter’s transcript may show the trial court’s motivation; the *minutes* must reflect the reason ‘so that all may know why this great power was exercised.’” (*People v. Orin*, *supra*, 13 Cal.3d at p. 944, italics in original.) “The purpose behind the requirement for specification of reasons in the minutes has been stated to be: to protect the interests of the public [citations], to protect the public interests against improper or corrupt dismissals [citations], to restrain judicial discretion and curb arbitrary action for undisclosed reasons and motives [citations], and to enable the appellate court to determine whether discretion has been properly exercised. [Citations.]” (*People v. McAlonan* (1972) 22 Cal.App.3d 982, 986.) Thus, “[a] specification of reasons couched in conclusionary language, and which fails to set out the factual basis upon which the conclusions are reached, thwarts the very purpose of the statutory requirement and fails to give effect to the legislative intent behind it.” (*Id.* at p. 986.) If it cannot be determined from reading the order, as entered upon the minutes, what facts motivated the trial judge, the requirement has not been met. (*Ibid.*)

We hold that the “Clarification of Order” did not cure the noncompliance with section 1385. The general reference therein to “see” other documents did not adequately identify the trial judge’s reasons for his decision to strike the enhancement in the interests of justice. A clear statement of Judge Couillard’s reasons, set forth in an order entered upon the minutes, was what the statute required. Because that requirement was never met, the order striking the enhancement was invalid. Accordingly, we will remand the case to allow the trial court to exercise its discretion to strike the enhancement (or strike

the additional punishment for same) under section 1385, with directions that it set forth, in an order entered upon the minutes, a specific statement of its reasons.⁶

II. Order Granting Summary Relief in Petition for Habeas Corpus Violated Due Process

Appellant contends that it was denied due process under the statutory provisions governing habeas corpus proceedings because Judge Ferguson granted summary relief on the merits of the petition without first issuing a writ or an order to show cause. We agree.

If a trial court believes a petition for writ of habeas corpus shows a *prima facie* basis for relief, it *must* either issue a writ or an order to show cause directed to the person having custody of petitioner and which allows such person to file a return. (*People v. Romero* (1994) 8 Cal.4th 728, 737-738; *In re Scott* (1994) 27 Cal.App.4th 946, 948-950; §§ 1476, 1477, 1480; Cal. Rules of Court, rule 4.551(c) & (d).) An opportunity to file a return is an essential part of the process (*People v. Romero, supra*, 8 Cal.4th at p. 739), as it permits the person who has custody of the prisoner to present facts and authorities he or she wishes the court to review and consider. (*In re Scott, supra*, 27 Cal.App.4th at p. 950.) Thus, although judges may summarily deny habeas petitions, they may not summarily grant them. (*People v. Romero, supra*, 8 Cal.4th at pp. 739-742.)⁷

As summarized by our Supreme Court, the issuance of a writ or order to show cause is *mandatory* as a prerequisite to granting relief:

⁶ Of course, if the court does not do so, its only other option is to impose the enhancement, since it is mandatory unless stricken. (See *People v. Langston, supra*, 33 Cal.4th at p. 1241; *People v. Jones, supra*, 8 Cal.App.4th at p. 758; *People v. Eberhardt, supra*, 186 Cal.App.3d at p. 1123.) It seems clear, in light of the plea bargain and the court's sentencing orders, that imposition of the enhancement and its punitive consequences was never intended.

⁷ In this regard, appellant observes that correctional and prosecutorial offices do not automatically respond to every petition because, among other things, the courts are entitled to deny them summarily. To the extent that such offices do await the issuance of a writ or order to show cause before filing a return, they would be acting in reasonable reliance upon the statutory procedures regulating writs of habeas corpus.

“As this summary of habeas corpus procedure reveals, issuance of a writ of habeas corpus or an order to show cause is an intermediate but nonetheless vital step in the process of determining whether the court should grant the affirmative relief that the petitioner has requested. The function of the writ or order is to ‘institute a proceeding in which issues of fact are to be framed and decided.’ (*In re Hochberg, supra*, 2 Cal.3d 870, 876, fn. 4, italics omitted.) The issuance of either the writ of habeas corpus or the order to show cause creates a ‘cause,’ thereby triggering the state constitutional requirement that the cause be resolved ‘in writing with reasons stated’ (Cal. Const., art. VI, § 14; see *People v. Pacini, supra*, 120 Cal.App.3d 877, 884). Thus, the writ or order is the means by which issues are joined (through the return and traverse) and the need for an evidentiary hearing determined.

“As the means by which a judicial proceeding is instituted, the issuance of the writ (or order to show cause) is mandatory, not optional. Penal Code section 1476 states that ‘[a]ny court or judge authorized to grant the writ, to whom a petition therefor is presented, ... *must*, if it appear that the writ ought to issue, grant the same without delay’ (Italics added.) This court has confirmed this statutory command: ‘[I]f a petition for habeas corpus makes a prima facie showing, then the opposing side *must* be given an opportunity to file a return to the petition.’ (*Adoption of Alexander S., supra*, 44 Cal.3d 857, 865, italics added; see also *In re Sixto, supra*, 48 Cal.3d 1247, 1251-1252; *In re Lawler, supra*, 23 Cal.3d 190, 194; *People v. Getty, supra*, 50 Cal.App.3d 101, 110-111.)” (*People v. Romero, supra*, 8 Cal.4th at p. 740, fn. omitted.)

Respondent concedes that a court may not summarily grant a petition for writ of habeas corpus, but argues that the writ proceeding in this case was rendered “moot” by the fact that Judge Couillard had already stricken the enhancement. We disagree, for two reasons. First, the order striking the enhancement was ineffective under section 1385 due to failure to provide a statement of reasons. Second, Judge Couillard subsequently referred to Judge Ferguson’s ruling, such as in the hearing of appellant’s motion for reconsideration and in the “Clarification of Order” striking the enhancement. Under all the circumstances, we find the petition for writ of habeas corpus was not moot.

In conclusion, because the trial court granted relief on the merits of the petition for writ of habeas corpus without first issuing a writ or order to show cause, the appellant

was deprived of an opportunity to file a return, which would have afforded an opportunity to address legal and factual issues presented in the petition. The court's failure in this regard amounted to a violation of due process. (See *In re Scott, supra*, 27 Cal.App.4th at pp. 949-950.) Accordingly, the order granting the petition is reversed. The matter is remanded for further proceedings consistent with this opinion.

DISPOSITION

We hold that the order striking the great bodily injury enhancement was invalid due to failure to include a statement of reasons as required by section 1385. We reverse the order and remand to allow the trial court to exercise its discretion under section 1385, as was clearly intended, but direct that any order striking the enhancement (or striking the additional punishment for same) shall set forth the court's reasons in compliance with section 1385.

Kane, J.

WE CONCUR:

Harris, Acting P.J.

Wiseman, J.